origin and dilution under federal and Louisiana trademark law, arising out of alleged breaches of the 1998 Agreement by the Dickie Brennan Group. Brennan's also sought nullification of the 1998 Agreement on the ground that Dickie had allegedly fraudulently induced it to enter into the 1998 Agreement. Brennan's further claimed that Dickie had materially breached the 1998 Agreement and that it should be judicially terminated as a result. Brennan's ultimate objective was to have the 1998 Agreement terminated, on any grounds and under any theory available, so that it could try to prevent Dickie from using his name on his restaurants.

Brennan I was tried before a jury, over a two-week period in late October-early November, 2002. To Brennan's utter dismay, the jury found that Dickie had not fraudulently induced Brennan's to enter into the 1998 Agreement and that Dickie had not breached the 1998 Agreement in such a way as to warrant its termination. The jury's verdict, instead, upheld the validity and effectiveness of the 1998 Agreement and maintained it in full force and effect, subject to Dickie's obligation of performance – certainly not the result that Brennan's desired or expected.

Brennan's filed post-trial challenges to the jury's verdict, which were rejected by the district court. Brennan's then appealed to the Fifth Circuit Court of Appeals. On appeal, Brennan's challenged the jury's verdict on the issue of fraudulent inducement, but did not appeal the jury's verdict on the issue of whether the 1998 Agreement should be terminated on account of alleged egregious, material breaches of it. On June 28, 2004, the Fifth Circuit rendered judgment remanding to the district court certain federal trademark issues, and affirming, in all respects, the jury's verdict on the issue of fraudulent inducement – *i.e.*, that Dickie did not fraudulently induce Brennan's into

entering into the 1998 Agreement, as well as the determination that the 1998 Agreement should not be terminated. Thus, the 1998 Agreement remained in full force and effect following the Fifth Circuit's opinion in *Brennan I*. The judgment in *Brennan I* is now final between Brennan's and the Dickie Brennan Group as to all claims asserted in *Brennan I, and,* under the doctrine of *res judicata,* as to *"all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen,* 442 U.S. 127, 131 (1979).

Vexed by, and dissatisfied with, the outcome of *Brennan I*, Brennan's then fired both the nationally known trademark attorneys and the local attorneys who had represented it in *Brennan I* and hired new counsel to represent and advise it, going forward, with regard to the remanded trademark issues. Brennan's ultimately elected not to assert any claims on remand, instead choosing to pursue yet another theory for terminating the 1998 Agreement that had been "discovered" by its new counsel–namely, that the 1998 Agreement is terminable at Brennan's whim under Louisiana Civil Code Article 2024 because it allegedly does not contain a term.

After its "discovery" of the new contractual termination theory – a ground for termination which was available at the time of *Brennan I*, but which was not asserted and obviously not discovered by Brennan's former counsel – Brennan's new counsel sent a letter to Dickie, dated August 5, 2004, (the "August 5 Letter"), notifying him that Brennan's was exercising its purported right, under Louisiana Civil Code Article 2024, to terminate the 1998 Agreement. The August 5 Letter notified Dickie that the 1998 Agreement was being terminated and demanded that Dickie cease the use of the name "Brennan" in connection

with his restaurant operations on or before October 5, 2004, the same relief sought in *Brennan I*.

Dickie did not, and does not, recognize any right of termination under Louisiana Civil Code Article 2024 and did not acquiesce in Brennan's demand that he cease using his name in connection with his restaurant operations. Although *Brennan I* was still on remand at the time, Brennan's filed a *new* complaint in the United States District Court for the Eastern District of Louisiana, against the Dickie Brennan Group, seeking termination of the 1998 Agreement under Article 2024, and injunctive relief. Although, for strategic reasons, Brennan's filed its second termination suit as a separate complaint, rather than as a matter pendent to its then-existing remaining claims for trademark infringement under the same 1998 Agreement, the case is really nothing more than the continuation of *Brennan I*, the ultimate goal of which, was to have the 1998 Agreement judicially terminated.

The new suit, *Brennan II*, was ultimately assigned to the same district judge who presided in *Brennan I*. In response to the new complaint, the Dickie Brennan Group filed a Motion to Dismiss the complaint under F.R.C.P. 12(b) based on *res judicata*.

On April 11, 2005, the district court, in a well reasoned opinion, granted the motion to dismiss. *See* District Court Opinion in *Brennan II*, App. to Petition, p. 3. The court noted that the only area of dispute between the parties for purposes of *res judicata* analysis was whether *Brennan I* and *Brennan II* involved the "same claim or cause of action." The court applied the "transactional" test of the *Restatement (Second) of Judgments*, § 24 (1982) (the "*Restatement*"), the test adopted by the Fifth Circuit for analyzing whether actions involve the "same claim or cause of action," and

specifically found that both actions sought termination of the 1998 Agreement, and that, although the grounds for termination were different in the two cases, the theory, or grounds for termination, asserted in *Brennan II* existed at the time the initial termination suit was filed in *Brennan I* and could have, and should have, been raised in *Brennan I*. Accordingly, the court ruled that the claims asserted in *Brennan II* are barred by *res judicata*. Brennan's appealed that judgment to the Fifth Circuit.

On June 23, 2004, while the appeal was pending in *Brennan II*, in a surprising move – and one that Respondents believe is relevant to the issue of whether *Brennan I* and *Brennan II* involve the same cause of action for *res judicata* purposes – Brennan's filed a Louisiana state court suit against its former counsel in *Brennan I*, alleging that they had committed legal malpractice by failing to seek termination of the 1998 Agreement under Article 2024.[4] In the Malpractice Action, Brennan's expressly asserted that the cause of action for termination under Article 2024 could have, and should have, been asserted in *Brennan I*, and cited counsel's failure to do so as an incident of legal malpractice. Supp. Appendix hereto, pp. 10-11, par. 28.

The Fifth Circuit ultimately affirmed the district court's ruling in a *per curiam* opinion, agreeing that the claims asserted in *Brennan II* arise from the "transaction" or "series of transactions" which were at the center of *Brennan I* – *i.e.*, the 1998 Agreement and Brennan's attempt to terminate it

[4] *See* the Petition filed in *Brennan's Inc. v. Edward Tuck Colbert, Kenyon & Kenyon, Leon H. Rittenberg, Jr., And Baldwin Haspel, L.L.C. f/n/a Baldwin & Haspel, L.L.C.*, No. 2005-8471 on the docket of the Civil District Court for the Parish of Orleans, State of Louisiana (hereinafter referred to as the "Malpractice Suit"), a copy of which appears in the Supplemental Appendix filed together herewith, p. 1.

under any available theory – and therefore, constitute the same cause of action for purposes of *res judicata*. The Fifth Circuit found that the claims in *Brennan II* should have been asserted in *Brennan I*, but were not, and are now barred. *See* Fifth Circuit opinion in *Brennan II*, App. to Petition, p. 1. Brennan's petitioned the Fifth Circuit for an *en banc* rehearing, which was also denied. *Id.*, 22-23. Brennan's now seeks to invoke the supervisory jurisdiction of this Court to review the Fifth Circuit's decision.

REASONS FOR DENYING THE PETITION

Nowhere in the Petition does Brennan's state which part(s) of Rule 10 of this Court's Rules supports its request that this Court exercise its supervisory jurisdiction over this matter. From the text of the Petition, however, it appears that Brennan's is relying on Rule 10(a) and (c). In addition, even though it has not identified any provision in Rule 10 that arguably supports its request, Brennan's asks this Court to overturn the Fifth Circuit's application of the "transactional" test to the facts of this case. As will be demonstrated below, however, there is no compelling reason, under any part of Rule 10, warranting the exercise of supervisory jurisdiction in this matter.

A. The Law With Regard To The Application Of *Res Judicata* Has Been Sufficiently Developed By This Court And The Fifth Circuit's Opinion Is Not In Conflict With The Jurisprudence Of This Court.

The doctrine of *res judicata* has been an accepted tenent of the law for longer than there have been courts in this country. *See Washington v. Sickles*, 65 U.S. 333, 343

(1861) ("[t]he authority of *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists). The doctrine is well-developed in the jurisprudence of this Court, which has characterized it as serving a 'vital public interest,' namely, that of putting an end to litigation, such that 'those who have contested an issue shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties.'" *Federated Department Stores*, 452 U.S. at 401. (Citations omitted). *See also Cromwell*, 94 U.S. at 352 (A final judgment "is a finality as to the claim or demand in controversy concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."); *Sunnen*, 333 U.S. at 597 (A final judgment "puts an end to the cause of action *which cannot again be brought into litigation between the parties upon any ground whatsoever*.") (Emphasis added); *Felsen*, 442 U.S. at 132 ("*Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.*") (*Citing Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940)). (Emphasis added).

In accord with the foregoing long-standing jurisprudence of this Court, the Fifth Circuit has held that "[f]or a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases." *Nilsen v. City of Moss Point*, 701

F.2d 556, 559 (5th Cir. 1983). In this case, the only element that is contested is whether *Brennan I* and the instant action involve the "same cause of action."

Brennan's posits, in Sections A and C of its Petition, that this Court has not resolved the issue of the appropriate test to be applied by the federal courts in determining what constitutes the "same cause of action" for purposes of the application of the doctrine of *res judicata*, or claim preclusion, and that this important question of federal law should be settled by this Court. In fact, however, this Court has clearly indicated that the "transactional" test, as set forth in § 24 of the second *Restatement*, is the appropriate test. That section states:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The ***first*** *Restatement*, which was published in 1942, recognized the "same evidence" test advocated by Brennan's in its Petition as one test that could be utilized to

assess whether the causes of action in successive law suits between parties and their privies were the same.[5] According to the Comments to § 24 of the ***second** Restatement*, however, as time passed and certain concepts of law and procedure – *e.g.*, the concept of a "claim," rules regarding joinder and ancillary and pendent jurisdiction – developed and evolved, that test proved too rigid and narrow. As a result, the ***second** Restatement*, which was promulgated in 1982, abandoned the "same evidence" test, in favor of the more pragmatic "transactional" test set forth in § 24, quoted above.[6]

[5] Another traditionally accepted test for determining identity of claims, the "same right, same wrong" test, was described in § 63 of the first *Restatement*. Under that test, the inquiry is whether there is but a single wrongful invasion of a single primary right of the plaintiff, though the theories of recovery might differ. *See Baltimore Steamship Company*, *supra*.

[6] The same is true of the "same right, same wrong" test. Comment (a) to § 24 in the second *Restatement* explained that:

> [I]n the days when civil procedure still bore the imprint of the forms of action and the division between law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief . . . In those earlier days there was also some adherence to a view that associated claim with the assertion of a single primary right as accorded by the substantive law, so that, if it appeared that the defendant had invaded a number of primary rights conceived to be held by the plaintiff, the plaintiff had the same number of claims, even though they all sprang from a unitary occurrence . . . Still another view of claim looked to sameness of evidence; a second action was precluded where the evidence to support it was the same as that needed to support the first. . . .
>
> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the

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This Court first recognized the "transactional" test shortly after the second *Restatement* superceded the first. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 n. 22 (1982), this Court stated that "[*r*]*es judicata* has recently been taken to bar claims arising from the ***same transaction*** even if brought under different statutes. . . ." (Emphasis added). In connection with that statement, the Court made specific reference to the draft revisions to the first *Restatement*, which promoted the adoption of the "transactional" test, but which were pending publication at the time. *Id.*

In Section C of its Petition, Brennan's relies upon *Nevada v. United States, et al.*, 463 U.S. 110 (1983), in support of its argument that this Court has not indicated that the "transactional" test is the appropriate test to be applied in this context. According to Brennan's, this Court discussed both the "transactional" test and the "same evidence" test, in *Nevada v. U.S.*, but refused to opt for one over the other. *See* Petition, p. 8. Respondents submit that Brennan's has misinterpreted the Court's pronouncement in that case.

As stated above, prior to 1982, the first *Restatement* provided that, for purposes of *res judicata*, causes of action would be deemed to be the same "if the evidence needed to sustain the second action would have sustained the first

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number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

action." The suit at issue in *Nevada v. U.S.* was filed in 1973, *before* the second *Restatement* came into being. The second *Restatement* abandoned the "same evidence" test, in favor of the "transactional" test quoted above, finding the latter to be "more pragmatic" as stated in the Comments to § 24.

The United States, on behalf of the Pyramid Lake Indian Reservation (the "Tribe"), plaintiff in the 1973 action, recognized that the "same evidence" test for determining whether the prior suit involved the same cause of action for purposes of *res judicata* was no longer applicable under the second *Restatement*, but argued that the Court should, nevertheless, apply the old test to determine whether the causes of action were the same, because that test was in effect at the time the 1973 action was filed. *See Nevada,* 463 U.S. at 131, n. 12. Thus, the Tribe was arguing that the "transactional" test should not be applied *retroactively*.

Although, as Brennan's correctly states, the Court did find that the result in the case would be the same under either test, it also recognized that the "same evidence" test had never, even prior to the publication of the second *Restatement* in 1982, been the *only* test by which to assess the issue of "same cause of action" for purposes of *res judicata. Id., citing The Haytian Republic,* 154 U.S. 118, 125 (1894); *Baltimore Steamship Co.,* 274 U.S. at 321. More importantly, however, the Court did not suggest that the "same evidence" test – which the American Law Institute abandoned and superceded as a stand-alone test in the second *Restatement*, advocating, instead, the "transactional" test – has any continuing validity, in modern procedural terms, as a device, in and of itself, by which to compare successive claims for purposes of *res judicata*. Nor has the

Court given any such indication since its decision in *Nevada v. U.S.*; instead, this Court has acknowledged – at least implicitly – in both *Kremer* and *Nevada v. U.S.*, that the pragmatic approach established in the second *Restatement* is best suited to the task of determining whether two cases involve the "same cause of action" for purposes of claim preclusion under the doctrine of *res judicata*.

In line with the second *Restatement* and the jurisprudence of this Court, the Fifth Circuit has also adopted the "transactional" test. *See Nilsen v. City of Moss Point*, 701 F.2d 556, 560 n. 4 (5th Cir. 1983) (*en banc*), *cert. denied*, 423 U.S. 908, *rehg. denied*, 423 U.S. 1026 (1985). As will be demonstrated below, and contrary to Brennan's assertions, so has every other federal circuit court. Because the "transactional" test, has been approved by this Court and adopted by all of the federal circuit courts of appeals, there exists no important issue of unsettled law that should be determined by this Court. Accordingly, the exercise of this Court's supervisory jurisdiction is not warranted under Rule 10(c) of the Rules of this Court.

B. There Is No Split Of Authority Between The Fifth And Second Circuits Warranting The Exercise Of This Court's Supervisory Jurisdiction.

At Section B of the Petition, Brennan's appears to argue that there is a split in the circuits, particularly, the Fifth and the Second, that needs to be resolved by this Court. According to Brennan's, the Second Circuit, employs a "same evidence" test, as opposed to a "transactional" test, to determine whether the cause of action involved in a second federal suit between the same parties (or those in privity with them) is the same as that in a

prior suit wherein a final, federal judgment was rendered, thereby putting it at odds with the Fifth Circuit.[7]

Brennan's admits, however, at page 8 of the Petition, again, citing 82 A.L.R. Fed. 829, that a majority of the circuit courts of appeals – at least seven of them, according to Brennan's – have adopted the "transactional" test, thereby implying, without ever specifically so stating, that the remaining circuit courts of appeal have adopted the "same evidence" test that Brennan's advocates in the Petition. In fact, however, Note 8 to the A.L.R. article cited by Brennan's identifies twelve circuit courts of appeals – the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits – that have adopted the second *Restatement's* "transactional" test. 82 A.L.R. 829, § 2, n. 8. Although not included in the annotations to the A.L.R. article, the Third Circuit has also expressly adopted the "transactional test."[8] Thus, *all* of the federal circuit courts of appeals

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[7] At page 7 of the Petition, Brennan's refers, in passing, to a test allegedly employed by the Ninth Circuit that analyzes the "essential" or "operative" facts and issues in the first and second suits to determine whether they involve the same cause of action. Brennan's admits, however, that the "essential" or "operative" facts analysis is "closely related" to the "transactional" test utilized by the Fifth Circuit, thereby implying that the two approaches would yield the same result. In fact, that is the case, since the "transactional" test employed by the Fifth Circuit examines the operative facts in order to determine sameness. It is interesting to note, however, that the article at 82 A.L.R. Fed. 829, on which Brennan's heavily relies, categorizes the Ninth Circuit as having adopted the "transactional" test set forth in the second *Restatement*. *See* 82 A.L.R. Fed. 829, § 2, n. 8.

[8] The Third Circuit adopted the "transactional" test in *United States v. Athalone Industries, Inc.*, 746 F.2d 977, 984 (3rd Cir. 1984) ("We are thus in keeping with 'the present trend . . . in the direction of requiring that a plaintiff present in one suit all the claims for relief that

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have adopted the "transactional" test, although, each court may consider one or more criteria in order to gauge whether two causes of action, in fact, arise out of the same transaction. Comment (b) to § 24 of the second *Restatement* approves of such an approach:

> *Transaction; application of a pragmatic standard.* The expression 'transaction or series of connected transactions,' is not capable of mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. . . .
>
> It should be emphasized that the concept of transaction is here used in the broad sense it has come to acquire in the interpretation of statutes and rules governing pleading and other aspects of civil procedure. . . .
>
> In general, the expression connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. *But the opposite does not hold true; even when there is*

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he may have arising out of the same transaction or occurrence.'") (Citation omitted).

> *not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.*

(Emphasis added).

Although Brennan's suggests otherwise to this Court, in reality, as seen above, the "same evidence" test, as such, does not exist in the second *Restatement*, nor does the Second Circuit any longer apply the old "same evidence" test, as such. Both cases cited by Brennan's for the contrary proposition, *Tucker v. Arthur Anderson & Co.*, 646 F.2d 721 (2nd Cir. 1981) and *Ruskay v. Jensen*, 342 F. Supp. 264 (S.D.N.Y. 1972), *aff'd.*, 552 F.2d 392 (2nd Cir.), *cert. denied*, 434 U.S. 911, 98 S.Ct. 312, 54 L.Ed.2d 197 (1977), pre-date the second *Restatement*. The current "transactional" approach advocated by the second *Restatement*, and adopted by the all of the circuit courts of appeals, including the Second Circuit, allows for a consideration of evidentiary issues, but not in a vacuum, rather, in the context of the factual predicate, as a whole, in order to determine whether the claims asserted in the two actions arise out of the same transaction.

In *Woods v. Dunlop Tire Corporation*, 972 F.2d 36, 38 (2nd Cir. 1992), the Second Circuit stated that "[w]hether or not the first judgment will have preclusive effect depends in part on whether the *same transaction or connected series of transactions is at issue*, whether the same evidence is needed to support both claims and whether the facts essential to the second were present in the first." (Citation omitted). In *Pike v. Freeman*, 266 F.3d 78 (2nd Cir. 2001), the Second Circuit reiterated that "[w]hether a claim that was not raised in the previous action could have been raised therein 'depends in part on whether the same

transaction or connected series of transactions is at issue and whether the same evidence is needed to support both claims.'" (Citation omitted). The Court went on to explain its application of the test, as follows:

> To ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties expectations or business understanding or usage.' . . . As this 'same transaction' test indicates, the 'could have been' language of the third requirement is something of a misnomer. The question is not whether the applicable procedural rules *permitted* assertion of the claim in the first proceeding; rather, the question is whether the claim was sufficiently related to the claims that were asserted in the first proceeding that it *should have been* asserted in that proceeding. . . .

Id. (Citations omitted; emphasis in original). *See also Woods v. Potter*, 63 Fed. Appx. 590, 591 (2nd Cir. 2003) (A "transactional analysis [is to be applied in determining] whether a claim is precluded from adjudication by a previous decision.") (Citation omitted).

As stated above, the Fifth Circuit adopted the transactional test enunciated in § 24 of the second *Restatement*, including Comment (b) thereto, in *Nilsen*, *supra*. 701 F.2d at 560 n. 4. The Fifth Circuit's analysis, under the "transactional" test focuses mainly on whether the two actions are based on the same nucleus of operative facts. *Agrilectric Power Partners, Ltd. v. General Electric Co.*, 20 F.3d 663, 665 (5th Cir. 1994); *In Re Southmark Corp.*, 163 F.3d

925, 934 (5th Cir. 1999). Under the Fifth Circuit's approach, "substance, not technicalities, governs the application of [the] test." *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1125 (5th Cir. 1987). (Citation omitted). (*rev'd. on other grounds*, *Thomas v. Capital Services*, 836 F.2d 866 (5th Cir. 1988)).

In its Petition, Brennan's has pointed this Court to no case which establishes an inconsistency between the Second and Fifth Circuits in their application of the "transactional test," and it is submitted that there is none – particularly, none that would have altered the result in this case. As demonstrated by its holdings in *Woods* and *Pike*, *supra*, the Second Circuit's substantive approach comports with that of the Fifth Circuit. There is no split between those circuits and no reason for this Court to exercise its supervisory jurisdiction under Rule 10(a) of the Rules of this Court.

C. The Fifth Circuit Properly Applied The "Transactional" Test In This Case.

At no point in the courts below did Brennan's suggest that, for purposes of claim preclusion under the doctrine of *res judicata*, the "same evidence" test is the appropriate test by which to determine whether the cause of action that it asserts in this case is the same as that asserted in *Brennan I*. Instead, it accepted that the "transactional" test is the proper test, but merely argued that under the "transactional" test, as it is routinely applied by the Fifth Circuit, the two causes of action were not the same. Brennan's now argues before this Court that the Fifth Circuit misapplied the "transactional" test by, according to

Brennan's, failing to distinguish between the exercise of a contractual right and a cause of action. Petition, pp. 9-11. As the Fifth Circuit held, however, this is a distinction without a difference. *See* Fifth Circuit's opinion in *Brennan II*, App. to Petition, p. 2.

Unless a contractual right is self-operative, all that it does is to give rise to a cause of action for the judicial enforcement of the right. The *only* way that Article 2024 termination can be self-operative is if the party against whom termination is sought acquiesces in the termination. Not only has Dickie not acquiesced in the attempted termination, he has disputed that the 1998 Agreement is even subject to Article 2024. In order to terminate the 1998 Agreement, therefore, Brennan's has asserted a cause of action to judicially enforce its alleged contractual right under Article 2024. A "cause of action" for purposes of claim preclusion is clearly at issue. The Fifth Circuit was correct on that point.

The Fifth Circuit also correctly determined that the 1998 Agreement is the "transaction" that is at the root of both *Brennan I* and *Brennan II*. *See id.*, at App. to Petition, pp. 1-2. Under the "transactional" test established in § 24 of the second *Restatement*, "a contract is generally considered to be a single transaction for purposes of claim preclusion." 18 James W. Moore, *Moore's Federal Practice* § 131.23, at 131-61 (3rd ed. 2004).

Brennan's objective in *Brennan I* was to secure termination of the 1998 Agreement by any means, any grounds, and under any theory, possible. It failed to achieve its goal in *Brennan I*, and, obviously, retained new counsel to find another way to skin the proverbial cat. Acting with the

benefit of fresh eyes cast on an old problem, Brennan's new counsel now has raised the instant alternative ground for termination of the 1998 Agreement, one that was obviously overlooked by Brennan's original counsel.

Here, there is but one contract and one right to seek termination, although there may exist more than one ground upon which to seek termination. In *Brennan I*, Brennan's sought termination on two separate grounds. If it had yet a third basis for seeking termination available to it at that time, it could have, and should have, asserted that cause of action in *Brennan I*, as the Fifth Circuit so held. Fifth Circuit's opinion in *Brennan II*, App. to Petition, p. 2.

Brennan's argues, however, that, at the time of *Brennan I*, it had "no reason or even ability to assert an Article 2024 cause of action for termination in the 2000 Lawsuit [which was not tried until October, 2002]." Petition, p. 10. What Brennan's fails to state, however, is that the *only* impediment to asserting its cause of action, under Article 2024 was that Brennan's either chose not to send a termination letter prior to the trial in *Brennan I*, or as is more likely, that its former counsel in *Brennan I* simply failed to think of the alternative termination grounds available at the time. Brennan's could easily have sent a termination letter prior to, or during the pendency of, *Brennan I* and could have obtained leave, under F.R.C.P. 15, to amend its Complaint to have included that additional, alternative ground for termination.

Brennan's arguments that any attempt to assert an Article 2024 cause of action in *Brennan I* would have been

premature, that the Fifth Circuit's holding implicates *future* contractual rights and obligations, and that it had "no reason or ability to assert an Article 2024 cause of action" in *Brennan I* are disingenuous. Petition, pp. 10, 11. Brennan's has represented to this Court that the right to terminate granted under Article 2024 is "inherent" in every Louisiana contract of indefinite duration. *Id.*, p. 11. Thus, the right to terminate under Article 2024, if it exists at all, existed, and was fully ripe, at the time of *Brennan I*, as a matter of state law. *Nothing* has occurred since that time to cause any such right to subsequently spring into existence, and no future contractual rights or obligations are implicated here. No impediment, legal or otherwise, prevented Brennan's from asserting a cause of action for termination under Article 2024 in *Brennan I*.

It now appears obvious, from the allegations asserted by Brennan's in the Malpractice Action, that the only reason that Brennan's did not pursue a termination cause of action under Article 2024 in the prior proceeding is because its former attorneys, allegedly, failed to advise Brennan's of the existence of the cause of action under Article 2024. *See* Malpractice Suit, Supp., App. pp. 10-11, pars. 28(f)-(h).[9] *Brennan I* was extremely hard-fought, with

[9] In conducting its *de novo* review of the granting of a motion to dismiss on grounds of *res judicata*, this Court is entitled to take judicial notice of the filing of the Malpractice Suit, pursuant to Rule 201(b)(2) of the Federal Rules of Evidence. The facts of Brennan's filing of the Malpractice Suit and the allegations contained therein cannot reasonably be disputed by Brennan's and are capable of accurate and ready determination by resort to the copy of the petition appearing at 1 of the Supplemental Appendix. "A court may . . . take judicial notice of its own records *or of those of inferior courts.*" *ITT Rayonier Inc. v. U.S.*, 651 F.2d 343, 345, n. 2 (5th Cir. 1981). (Emphasis added.) *See also Kinnett Dairies, Inc. v. J.C. Farrow*, 580 F.2d 1260, 1277, n. 3 (5th Cir. 1978).

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substantial discovery, extensive pre-trial motions and a two week jury trial. Under the circumstances, it is simply inconceivable that, had Brennan's realized that it had the Article 2024 arrow in its quiver, it would not have fired that shot in *Brennan I*.

Comment(d) to *Restatement* § 25 addresses this very situation, as follows:[10]

> *Successive actions changing the theory or ground.* Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred.

Illustration 7 to § 25 elucidates this principle:

> A brings an action against B for the cancellation of a contract made with B, alleging that the contract was procured by the undue influence and fraud of B. After verdict and judgment for B, A

Under Rule 201(f) of the Federal Rules of Evidence, judicial notice "may be taken at any stage of the proceeding." Goode, *Courtroom Handbook on Federal Evidence*, Comment (11), p. 216 (2005).

[10] Section 25 of the second *Restatement* states:

> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.

> brings a new action for cancellation of the contract, alleging mental incompetency of A. The prior judgment is a bar.

Applying the factual pattern of the Illustration to the situation at hand demonstrates that this case is on all fours with the Illustration. In *Brennan's I,* Brennan's brought an action against Dickie seeking recision of the 1998 Agreement based on fraud, or, alternatively, a termination of it based on breach. Judgment was entered in Dickie's favor on the claims for termination. Brennan's then brought a new action for termination of the contract based on the allegation that the contract has no term and is, therefore, terminable at will, under Article 2024. If the 1998 Agreement has no term, which is denied, it had no term at the time it was executed and at all times thereafter, including (i) at the time *Brennan I* was filed in 2000, and (ii) at the time *Brennan I* went to trial in late October 2002. Under the "transactional" test, "a mere change in legal theory does not create a new cause of action." 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 4407 (2002), at 179. "[A] claim is coterminous with a transaction or series of transactions, regardless of the number of different legal theories that may arise as a result of plaintiff's alleged damages . . . ***The fact that plaintiff's counsel in the first action didn't happen to think of the theory advanced in the second action will also fail to avoid preclusion.***" 18 *Moore's Federal Practice* § 131.21[3][a], at 131-43-33. (Emphasis added).

Thus, Brennan's was required to assert its Article 2024 cause of action to enforce its alleged right to terminate the 1998 Agreement in *Brennan I.* As the Fifth Circuit correctly

held, "[h]aving failed to raise [that] argument in the original suit . . . [Brennan's] is unable to file a new suit for ***purposes of rehashing old battles***." Fifth Circuit's opinion in *Brennan II*, App. to Petition, p. 2. (Emphasis added). The Fifth Circuit applied the transactional test in the manner contemplated in the *Restatement* and its resulting decision should not be disturbed.

D. Brennan's Has Not Demonstrated That The Result Would Have Been Different Under The "Same Evidence" Test.

Brennan's argues in Section D of the Petition that because the application of the "same evidence" test would purportedly have yielded a different result under the facts of this case, that test is the one that should have been applied by the Fifth Circuit, a matter not raised in Question 1 of the "Questions Presented" in Brennan's Petition. Petition, pp. i and 9. Obviously, as demonstrated above, under the second *Restatement*, the jurisprudence of this Court and the jurisprudence of every circuit court in this country, the "transactional" test is the proper test to apply in this situation.

Even if, however, by some reversal, it should be determined that the "same evidence" test applies, as a stand-alone method by which to compare claims for sameness, Respondents do not believe that the application of that test would have resulted in a different outcome under the facts of this case. As stated in Comment (b) to § 24 of the second *Restatement*, even the fact that there may not be a "substantial overlap" in the evidence needed to support the claims in the first and second cases does not necessarily mean that the

second claim is not precluded under *res judicata*. Even the Second Circuit, which Brennan's claims applies the "same evidence" test recognizes as much. However, in this case, there is a total overlap of the "same evidence."

In *Ruskay, supra*, the plaintiffs sought to defeat a motion for summary judgment based on *res judicata* grounds on the basis that the evidence required to prove the claim in the first suit was different than that which would support the claim in the second suit. The court rejected the plaintiffs' argument, observing that "[t]he 'same evidence' test may be useful as a positive test for determining the identity of claims, but ***it is not valid as a negative test***." 342 F.Supp. at 270-71. (Citation omitted; emphasis added). The Court went on to state that "[i]t will often be true that a decision on one theory of recovery will have no bearing on the determination of another. ***This does not mean that each theory states a distinct cause of action***." *Id.* at 271. (Citation omitted; emphasis added). *See also Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 34 (8th Cir. 1964) ("In short, 'the same evidence test,' if applied with complete literalness, is valid as a positive but not as a negative test for determining the identify of causes.") (Citation omitted).

In this case, however, the only evidence needed to determine the validity of Brennan's Article 2024 argument is the 1998 Agreement. That agreement was squarely at issue, and was introduced into evidence, in *Brennan I*. The fact that other additional evidence may have been required to prove Brennan's entitlement to termination of the 1998 Agreement under its other theories of recovery does not weigh in favor of a finding that the causes of action in *Brennan I* and *Brennan II* are not the same for purposes of

res judicata. There was a single contract at issue here and if Brennan's had prevailed on any theory asserted for its dissolution, there would have been but a single termination. Thus, under any test, the causes of action in *Brennan I* and *Brennan II* are the same for purposes of claim preclusion under the doctrine of *res judicata*.

CONCLUSION

Under the *Restatement*, the jurisprudence of this Court, and the jurisprudence of every circuit court of appeal in the country, the appropriate test to determine sameness of causes of action for purposes of *res judicata* is the Restatement's "transactional" test, not the "same evidence" test, as advocated by Brennan's in its Petition. The Fifth Circuit Court of Appeals properly applied that test to the operative facts underlying *Brennan II* and correctly concluded that, *Brennan II* involves the same cause of action as *Brennan I*, for purposes of *res judicata*. *Brennan II* does nothing more than advance an alternative ground or theory of recovery for termination of the 1998 Agreement, one that was available at the time *Brennan I* was litigated. That theory could have, and should have, been raised in *Brennan I*, as the district court and the Fifth Circuit have both concluded.

That being the case, Brennan's is barred by *res judicata* from raising it now. The result would be no different under the "same evidence" test advocated by Brennan's. The Fifth Circuit's decision was correct in all respects and this Court should now act to finally put an end to this repetitive, and seemingly unending, litigation by denying Brennan's Petition for Certiorari.

Accordingly, for the reasons fully stated herein, Respondents, Richard J. Brennan, Jr., Dickie Brennan & Company, Inc., Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. request that this Court deny the Petition for Writ of Certiorari filed by Petitioner, Brennan's, Inc.

Respectfully submitted,

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CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

No. 2005-8471

DIVISION

BRENNAN'S INC.

VERSUS

EDWARD TUCK COLBERT, KENYON & KENYON, LEON H. RITTENBERG, JR., AND BALDWIN HASPEL, L.L.C., f/n/a BALDWIN & HASPEL, L.L.C.

FILED: ____________ ________________
DEPUTY CLERK

PETITION FOR DAMAGES AND DECLARATORY JUDGMENT

(Filed Jun. 23, 2005)

The petition of Brennan's Inc., a Louisiana corporation in good standing with its domicile located in the Parish of Orleans, respectfully represents:

1.

The defendants in this lawsuit are:

a. Edward Tuck Colbert (hereinafter "Colbert"), on information and belief; a resident and domiciliary of Washington, D.C.;

b. Kenyon & Kenyon, a partnership with its principal office in New York, New York;

c. Leon H. Rittenberg, Jr. (hereinafter "Rittenberg"), a resident and domiciliary of the Parish of Jefferson, State of Louisiana; and

d. Baldwin Haspel, L.L.C. f/n/a Baldwin & Haspel, L.L.C. (hereinafter "Baldwin Haspel"), a Louisiana limited liability company with its domicile and registered office located in the Parish of Orleans.

2.

At all times material and pertinent, Colbert was a partner in Kenyon & Kenyon and was engaged in the practice of law in Washington, D.C., and has provided legal services in the State of Louisiana.

3.

At no time has Colbert been duly admitted to practice law in the State of Louisiana and therefore the provisions of La. R.S. 9:5605 are inapplicable to him.

4.

The law firm of Kenyon & Kenyon holds itself out as one of the largest and most diversified law firms in this country concentrating on the practice of intellectual property. It represents that it is equipped with the most preeminent intellectual property litigation group in this country and that it has some of the nation's best litigators who possess very deep and first-chair trial experience. Kenyon & Kenyon also represents that it strives to provide the best client representation through its experience, technological expertise, anticipation of client needs, clear and open communication, and an understanding of the vital role played by a comprehensive intellectual property protection and enforcement strategy.

5.

At all times material and pertinent, Rittenberg was a shareholder/member of Baldwin Haspel and was engaged in the practice of law at Baldwin Haspel's office located in the Energy Centre in New Orleans, Louisiana.

6.

The law firm of Baldwin Haspel holds itself out as providing its clients the highest quality legal services in a cost-effective manner in every area of the firm's practice as promptly as possible, utilizing available modern technological advances while maintaining traditional personal attention to its client's needs. In line with this commitment, the firm represents that it has continually expanded its capabilities to cover all areas of law affecting its clients.

7.

Brennan's Inc. owns and operates Brennan's Restaurant which is located in the French Quarter in New Orleans.

8.

Brennan's Inc. has used the service mark BRENNAN'S in connection with restaurant services continually since at least as early as 1951, and it has been granted federal trademark registrations recognizing its exclusive right to use the mark for such services under both federal and Louisiana law.

9.

Brennan's Inc. is currently owned by Owen E. Brennan, Jr., James C. Brennan, and Theodore M. Brennan ("the brothers") who are the sons of the late Owen E. Brennan, Sr., the founder of Brennan's Restaurant.

10.

During the latter part of the 1970's, litigation ensued between various members of the Brennan's family including the brothers, their mother, and several of the brothers' aunts and uncles (including Richard Brennan, Sr.) over the use of the federally registered trademark, BRENNAN'S.

11.

That litigation came to a close in 1979 with a settlement agreement and consent judgment which defined the various family members' rights in the BRENNAN'S trademark. Among other things, the agreement (hereafter "1979 Agreement") gave the brothers and their mother through Brennan's Inc. exclusive rights to the BRENNAN'S trademark in Louisiana and all other states except Texas and Georgia where Richard Brennan, Sr. and his siblings held exclusive rights. The agreement also provided that no party would open or operate a new restaurant in Louisiana using the Brennan name but permitted the parties to "aid" their descendants' efforts to own or operate restaurants "under any name." And with respect to future disputes that might arise, the agreement stated that neither side would assert its trademark rights against the other for uses permitted by the agreement, but

it also said that it did not bar future claims that might arise out of a breach of the agreement.

12.

In the late 1990's, Richard Brennan, Sr. gave his son, Richard Brennan, Jr. ("Dickie Brennan") and another child a majority interest in the Palace Café restaurant which began to be known as Dickie Brennan's Palace Café. Around that same time. Richard Brennan, Sr.. Dickie Brennan, and others decided to open a new restaurant in New Orleans called Dickie Brennan's Steakhouse.

13.

In 1998, the brothers became aware of the construction of Dickie Brennan's Steakhouse three blocks away from Brennan's Restaurant.

14.

At that time, Colbert and his law firm, Kenyon & Kenyon, and Rittenberg and his law firm, Baldwin Haspel, were engaged to represent Brennan's Inc. and they provided advice to Brennan's Inc. as regarded the preparation of a license agreement which would authorize Dickie Brennan's limited use of the Brennan's name.

15.

Colbert and Rittenberg advised the brothers to meet with Dickie Brennan to discuss how to manage the use of the family name in connection with their respective restaurants.

16.

Following the brothers' meeting with Dickie Brennan and pursuant to their engagement, Colbert and Rittenberg and other members of their law firms prepared what was represented to be a license agreement and which was subsequently executed by Brennan's Inc. and Richard Brennan, Jr. in November of 1998. A copy of this agreement (hereafter "1998 Agreement") is annexed as Exhibit A.

17.

In 2000, Brennan's Inc. and the brothers sued Dickie Brennan. Richard Brennan. Sr., Dickie Brennan's, Inc., Seven Sixteen Iberville, L.L.C. (the limited liability company which owns and operates Dickie Brennan's Steakhouse) and Cousins Restaurants. Inc. (the corporation which owns and operates Dickie Brennan's Palace Café), because notwithstanding the 1998 Agreement, it had experienced numerous instances of confusion on the part of its customers concerning the relationship between Dickie Brennan's Steakhouse, Dickie Brennan's Palace Café, and Brennan's Restaurant at 417 Royal Street.

18.

Defendants represented Brennan's Inc. and the brothers in the aforementioned lawsuit which was filed in the United States District Court for the Eastern District of Louisiana and docketed as Case No. 00-2413.

19.

The federal district court judge made several rulings that narrowed the issues for trial of the lawsuit. Among other things, the district court judge ruled (1) Richard Brennan, Sr. had breached the 1979 Agreement by owning a minority share of Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. and otherwise contributing to those businesses; (2) the 1979 Agreement barred the plaintiffs from bringing trademark-related claims against Richard Brennan, Sr. and the plaintiffs were limited to pursuing contract remedies against Richard Brennan, Sr.; (3) the 1998 Agreement barred the plaintiffs from pursuing trademark-related claims against Dickie Brennan and the plaintiffs would be limited to remedies for breach of contract unless they could show that the contract should be rescinded because of fraud or a serious breach; and (4) Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. could exercise the rights given to Dickie Brennan under the 1998 Agreement and the plaintiffs could not pursue trademark related claims against those companies.

20.

In November of 2002, after a two week trial a jury returned a verdict finding that Dickie Brennan had not fraudulently induced the plaintiffs to enter into the 1998 Agreement, that Dickie Brennan had breached the 1998 Agreement with respect to Dickie Brennan's Steakhouse but not Dickie Brennan's Palace Café, that Dickie Brennan acted in good faith and that his breach was not so serious as to justify dissolving the 1998 Agreement. The jury awarded Brennan's Inc. $250,000 for Dickie Brennan's breach of the 1998 Agreement, and on December 13, 2002, the United States District Court judge entered a

judgment on the jury verdict and ordered Dickie Brennan to bring his conduct into compliance with the 1998 Agreement.

21.

Defendants appealed the judgment of the United States District Court judge to the United States Court of Appeal for the Fifth Circuit on behalf of Brennan's Inc. and the brothers raising several issues but failing to challenge the district court's instructions to the jury regarding termination of the 1998 Agreement (*viz.*, the court's instructions that the jury had discretion to decide whether to declare the contract at an end or instead to require Dickie Brennan to specifically perform the contract; and that the jury's decision on this question could consider the severity of Dickie Brennan's breach, his good or bad faith, and the relative fairness of the two methods of dealing with the breach).

22.

On June 28, 2004, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming the district court's judgment in all respects except with respect to the rulings that the 1998 Agreement bars Brennan's Inc. and the brothers from pursuing trademark-related causes of action against Dickie Brennan. Cousins Restaurants, Inc. and Seven Sixteen Iberville, L.L.C. and that the 1979 Agreement bars Brennan's Inc. and the brothers from pursuing trademark-related causes of action against Richard Brennan, Sr. However, the court outlined several limitations or restrictions on Brennan's Inc.'s rights to pursue its trademark related claims.

23.

In its decision, the United Slates Court of Appeals for the Fifth Circuit noted specifically that the "1998 Agreement is best described as a consent-to-use agreement rather than a license" and that its "conclusions concerning the limitations on Dickie's liability for trademark infringement reflect both the peculiar nature of the 1998 Agreement and the fact that the agreement remains in force." It also noted that Brennan's Inc. did not assert on appeal the issues regarding termination of the contract.

24.

Shortly following the rendition of the judgment of the United States Court of Appeals for the Fifth Circuit, Brennan's Inc. terminated the services of defendants and engaged new counsel to represent it in matters pertaining to the ongoing problems with Dickie Brennan and his restaurants.

25.

The brothers first learned that the issues regarding termination of the contract were not asserted on appeal by defendants until after the United States Court of Appeal for the Fifth Circuit rendered its decision on June 28, 2004.

26.

On October 14, 2004, Brennan's Inc. filed a lawsuit in the United States District Court against Dickie Brennan and three of the companies in which he has an interest (*viz.*, Cousins Restaurants, Inc., Seven Sixteen Iberville,

L.L.C. and Dickie Brennan & Company seeking declaratory and injunctive relief decreeing that the 1998 Agreement was terminated and no longer effective and enjoining the defendants from violating its trademark rights.

27.

On April 11, 2005, the United States District Court judge dismissed this new lawsuit on grounds of *res judicata* finding in pertinent part that "[t]he time for Brennan's Inc. to litigate whether the 1998 Agreement was terminable at will under Article 2024 was in the prior suit in which it sought to terminate the agreement based on a breach thereof."

28.

Defendants were negligent and deviated below the standard of care in drafting the 1998 Agreement and in representing Brennan's Inc. in the federal court lawsuit in the following respects, not meant to be exclusive:

a. Failing to prepare a license agreement as opposed to a consent-to-use agreement;

b. Failure to include royalty provisions in the 1998 Agreement;

c. Failing to include a term in the 1998 Agreement;

d. Failing to include in the 1998 Agreement breach of contract provisions for the recovery of attorney's fees, costs, and specified damages;

e. Impairing or diminishing the strength of the trademark claims of Brennan's Inc. in the 1998 Agreement;

f. Failing to assert on appeal the issues regarding termination of the contract;

g. Failing to assert the claim to terminate the 1998 Agreement pursuant to Louisiana Civil Code Article 2024;

h. Failing to advise Brennan's Inc. of the potential *res judicata* or claim preclusive effect of defendants' failure to assert on appeal the issues regarding termination of the contract and failure to assert the claim to terminate the 1998 Agreement pursuant to Louisiana Civil Code Article 2024;

i. Any and all such other acts of negligence which will be shown at the time of trial hereof.

29.

As a direct and proximate consequence of the defendants' negligence and deviation below the standard of care for lawyers practicing in this community, Brennan's Inc. has and will continue to sustain monetary damage, loss and injury.

30.

Brennan's Inc. has also paid defendants Colbert and Rittenberg substantial sums of money for legal fees for the preparation of the 1998 Agreement and representation in the federal court lawsuit which defendants should he ordered to disgorge and return to plaintiff inasmuch as

there was a failure of consideration for such services and such services were provided in a negligent fashion.

31.

Furthermore, defendants Colbert and Kenyon & Kenyon seek approximately $2,000,000 of additional legal fees and costs from Brennan's Inc. for services rendered in connection with the federal court litigation.

32.

For the reasons set forth above, Brennan's Inc. is entitled to a judgment of this Court declaring that Colbert and Kenyon & Kenyon are not entitled to recover any sums from it for additional legal fees and costs for services rendered in connection with the preparation of the 1998 Agreement or the federal court litigation.

33.

Finally, in the event any of plaintiffs claims are found to be perempted under the provisions of La. R.S. 9:5605, plaintiff asserts the unconstitutionality of that statute under Louisiana Constitution Article 1, Section 22 because the statute deprives it of access to court.

34.

Plaintiffs prays for trial by jury and submits that the amount in controversy exceeds that amount required by Louisiana law for trials by jury.

WHEREFORE, Brennan's Inc. prays that each defendant be duly served and cited to appear and answer this

petition and that after the passage of all legal delays and due proceedings are had that there be judgment in favor of Brennan's Inc. and against Edward Tuck Colbert, Kenyon & Kenyon, Leon H. Rittenberg, Jr. and Baldwin Haspel, L.L.C., f/n/a Baldwin & Haspel, L.L.C. ordering them to pay Brennan's Inc. jointly, severally and *in solido* such sums as will reasonably compensate Brennan's Inc. for its damages together with interest from date of demand and all costs of these proceedings. Brennan's Inc. further prays that this Court enter judgment declaring that Edward Tuck Colbert and Kenyon & Kenyon are not entitled to recover any sums from Brennan's Inc. for additional unpaid legal fees and costs for services rendered in connection with the preparation of the 1998 Agreement or the federal court litigation. Plaintiff further prays for a trial by jury.

Respectfully submitted,

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